SOGELEASE ADVANCE (MALAYSIA) SDN BHD

v.

SRI DATAI ENGINEERING SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[SUIT NO: D1-22-2911-1998]
3 DECEMBER 2001

CIVIL PROCEDURE: *Summary judgment - Triable issues - Hire-purchase agreement - Outstanding sum not fully set out in statement of claim - Failure to mitigate damages - Failure to carry pre-sale valuation of machinery - Whether constituted triable issues - Refusal of summary judgment - Whether justified - Rules of High Court 1980, O. 14*

This was an appeal against the decision of the learned senior assistant registrar dismissing the plaintiff's application for summary judgment under O. 14 Rules of the High Court 1980. The facts were that the plaintiff and the first defendant had entered into a hire-purchase agreement ('the agreement') in respect of a machine known as Terek Articulated Dumper ('the machinery'). The agreement was guaranteed by the second to the sixth defendants. The first defendant defaulted in the repayments. That notwithstanding, the first defendant returned the machinery to the plaintiff, whereupon the same was sold to a third party allegedly for RM320,000. Having sold the machinery, the plaintiff demanded from the defendants the balance outstanding sum due under the agreement. Failing that, the plaintiff filed a claim against the defendants and subsequently applied for summary judgment.

The facts showed however that: (i) the plaintiff's letter of demand, as well as its statement of claim, did not fully explain on how the outstanding figure was arrived at; (ii) there was no evidence to suggest that RM320,000 had actually been paid for the machinery; (iii) the plaintiff had apparently not acted upon the first defendant's request to dispose of the machinery to overseas market; (iv) there was evidence to suggest that the machinery could have fetched a resale value of more than RM600,000; and (v) no valuation had been carried out in respect of the machinery prior to its sale hereof. Before the learned judge, the main question that arose was whether triable issues had been raised by the defendants, as to justify the decision of the learned SAR aforesaid.

Held:

[1] Since the plaintiff's claim is for special damages, it is incumbent on the plaintiff to prove with clarity the various claims contained in the statement of claim. Clearly, in an application to enter summary judgment such particulars on its various claims ought to be sufficiently set out with clarity in supporting affidavits. This the plaintiff has failed to do. (p 723 d)

[2] The court would require *viva voce* evidence to determine whether the letters of demand herein were in accordance with cl. 14(2)(a) of the hire purchase agreement. This apart, the plaintiff's alleged failure to mitigate damages is an arguable point, and hence a triable issue. (p 723 f)

[3] Since the plaintiff has not carried out any pre-sale valuation in respect of the machinery, the question of whether or not the machinery was sold at a reasonable price constituted issues that required *viva voce* evidence. This could only be adduced at the full trial of this matter. (p 725 c-d)

[Appeal dismissed.]

Case(s) referred to:

Fui Lian Credit & Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd & Ors [1991] 1 CLJ 522; [1991] 2 CLJ (Rep) 614 ***(refd)***

Hong Leong Finance Berhad v. Lee Cheng Heng t/a Lee Cheng Heng Earthwords & Anor [1987] 2 MLJ 266 ***(refd)***

Kesang Leasing Sdn Bhd v. Longwood Sdn Bhd & Ors [1988] 2 MLJ 328 ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corporation Berhad [1987] 2 MLJ 610 ***(refd)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank Berhad [1989] 3 MLJ 156 ***(refd)***

United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14

Other source(s) referred to:

Supreme Court Practice, 1995 vol 1, p 292, para 18/7/10

For the appellant/plaintiff - Amirtha MC Pirapu; M/s PM Tan, Chan & Partners

For the respondents/defendants - C Soosay Nathan; M/s Christies Soosay Nathan & Assocs

Reported by WA Sharif

JUDGMENT

Vincent Ng J:

Before me is an appeal (encl. 37) by the plaintiff against the decision of the learned senior assistant registrar dismissing the plaintiff's application for summary judgment under O. 14 of the Rules of the High Court 1980.

The plaintiff's claim against the respective defendants is founded on:

(a) a hire purchase agreement entered into between the plaintiff and the 1st defendant dated 24 October 1997 (exh. 'YTY1' of encl. 10) in respect of a machine described as one unit new Terek Articulated Dumper Model No: TEREX 3066C ('the aforementioned machinery');

(b) a corporate guarantee executed by the 2nd defendant dated 24 October 1997 (exh. 'YTY2A' of encl. 10);

(c) a personal guarantee and indemnity executed by the 3rd, 4th and 5th defendants dated 24 October 1997 (exh. 'YTY2B' of encl. 10); and

(d) a personal guarantee and indemnity dated 24 October 1997 executed by the 6th defendant (exh. 'YTY2C' of encl. 10).

The plaintiff's claim is for several alleged defaults in payment due under the aforesaid hire purchase agreement and guarantees.

After having studied the pleadings, affidavits and written submissions from both sides, I dismissed the plaintiff's appeal with costs as I found the following triable issues:

The monies claimed in the summary judgment application have not been verified in sufficient detail, nor have accounts been exhibited to demonstrate how the quantum of the various purported claims were arrived at.

Exhibit 'YTY3' is the letter of demand addressed to the 1st defendant for the amount of RM308,388.70, but:

(a) the plaintiff has failed to set out when the imposition of late payment charges at 0.065% per day commenced;

(b) there are two entries for 'storage fees' also set out in the aforesaid letter of demand at the rate of RM15 per day. There is however no explanation or documentation to demonstrate how the figure of RM15 per day was arrived at; and

(c) the said letter of demand also sets out that the sales proceeds obtained from the sale of the aforementioned machinery on 23 June 1998 was RM320,000. Whereas, encl. 34 (exh. 'YTY6') comprises three letters by 3rd parties dated 3 June 1998, 4 June 1998 and 17 June 1998, wherein various offers have been made by 3rd parties to purchase the aforementioned machinery. However, there does not appear to be any evidence that the sum of RM320,000 was in fact paid for the aforesaid machinery on 23 June 1998 or when in fact it was paid.

The plaintiff claims that the principal sum is RM263,788.39 and alleges that interest is payable thereon at the rate of 0.065% per day from 24 June 1998, whereas the letter of demand, that is exh. 'YTY3' of encl. 10, does not set out the figure of RM263,788.39 at all.

Since the plaintiff's claim is for special damages, it therefore follows that it is incumbent upon the plaintiff to prove with clarity the various claims contained in the statement of claim and in an application to enter summary judgment such particulars on its various claims ought to be sufficiently set out with clarity in its supporting affidavit(s). This the plaintiff has failed to do (see *Fui Lian Credit & Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd & 7 Ors* [1991] 1 CLJ 522; [1991] 2 CLJ (Rep) 614).

(2) Though it was not disputed that the hire purchase agreement was terminated on or about 5 March 1998 by the return of the aforesaid machinery by the 1st defendant to the plaintiff, the court would require *viva voce* evidence to determine whether the letters of demand (all dated 23 June 1998) to the 1st defendant (principal debtor) and the 2nd to 6th defendants (guarantors) were in accordance with cl. 14(2)(a) of the hire purchase agreement (exh. 'YTY1' of encl. 10), since the point was raised, quite plausibly to me, by the defendants about the impossibility of compliance with the terms of the letters of demand when the letters were deemed, under cl. 20, to have been received.

(3) Apparently, as an added measure to counter the aforesaid impugned letters of demand the plaintiff also asserted in their encl. 16 that they had also sent a further letter of demand dated 9 March 1998 to the 1st defendant. There are however two reasons why this letter cannot be relied upon as a ground to found a cause of action against the 1st defendant, namely: (a) this notice was not pleaded in the statement of claim, nor was the date ever mentioned therein (see *Supreme Court Practice* 1995 vol 1 p. 292 para. 18/7/10, *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239, *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206);

(b) the letter of demand was equivocal as to whether it was a demand letter or a notice to 'update the accounts' or to 'finalise the agreement' coupled with a threat to sell off the machinery in question. Thus, it is trite that extending carbon copies of this letter of 9 March 1998 to the 2nd to 6th defendants do not constitute effective and actionable demand against them even if (not so here) the notice to the 1st defendant is an effective notice of demand (see *Mok Hin Wah & Ors v. United Malayan Banking Corporation Berhad* [1987] 2 MLJ 610 and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri b Wan Rashid v. Kwong Yik Bank Berhad* [1989] 3 MLJ 156) – especially as cl. 8 of the executed guarantees clearly indicates that they are 'on demand' guarantees.

(4) The plaintiff's failure to mitigate damages was also raised by the defendants, based on detailed grounds and particulars laid out in their affidavits which appeared to me to be arguable and hence triable. By a letter dated 5 March 1998 the 1st defendant indicated their desire to return the machineries in question to the plaintiff subject to a right to appoint their 'own buyer for the aforesaid equipment if we find the offer price by others is too low'. This was followed by a letter dated 9 June 1998 which sought permission 'to dispose of the aforesaid trucks to overseas market' and 'to refurbish and repaint … at our own cost so that it would be able to fetch a better resale value'. Also to be noted is that the search results from the internet on the prices of the trucks was attached to the letter. This offer was to no avail, and it was the defendants' firm contention that while the aggregate price of the items concerned, in the internet search results (in exh. 'CYH4' of encl. 27) showed, a recoverable resale price of RM628,794.43 the plaintiff claimed to have sold them at only RM320,000 (see *Hong Leong Finance Berhad v. Lee Cheng Heng t/a Lee Cheng Heng Earthwords & Anor* [1987] 2 MLJ 266). To counter *Lee Cheng Heng (supra)*, the plaintiffs cited *Kesang Leasing Sdn Bhd v. Longwood Sdn Bhd & 3 Ors* [1988] 2 MLJ 328, and quoted a *dicta* of the learned judge which appears to declare that 'There is no basis in equity or in law for raising mitigation as an issue for trial'. Thus, it has become quite common for counsel for the plaintiff in cases such as the present case to invoke this *dicta* out of its proper context. Though perhaps, that often quoted *dicta* could (with respect) have been couched in more restrictive terms, it must be noted that this sentence was immediately followed by a definitive statement that 'The complaint is not made *bona fide*, has no merit and may be and is rejected out of hand'. Indeed, that decision was arrived at solely by virtue of and after the learned judge had considered the particular wording in cl. 8(iii) of the agreement, which provided a mode of computation of the amount due from the hirer – and

which was duly complied with by the owner. Thus clearly, the *dicta* in *Kesang Leasing (supra)* was quoted out of context, as, in the paragraph just above the impugned dicta, his Lordship also said that, and I quote: "While the Contracts Act does not impose a duty on the plaintiff suing in respect of a breach of contract to mitigate the damages, a **court of equity will be concerned to enquire whether the plaintiff had taken reasonable steps to mitigate the damage**."(emphasis added). This is a correct statement of the law and this, surely is the true tenor and import of the judgment.

Lastly, in the case at hand, there appears to be no pre-sale valuation carried out in respect of the aforesaid machinery. Hence, whether or not the aforesaid machinery was sold at a reasonable price remains issues that require *viva voce* evidence that can only be adduced at the full trial of this matter. And, as the hire purchase agreement and the three guarantee documents do not contain a 'conclusive evidence clause' the onus would rest on the plaintiff to prove every head of its claim.

In postscript, as the plaintiff has lodged an appeal against my decision, I have for obvious reasons, issued directions to the senior assistant registrar to stay the fixing of the suit for case management for trial until the disposal of the appeal.